

Application No. 10/694,960
AMENDMENT AFTER FINAL dated May 11, 2009
Reply to Office Action of February 27, 2009

REMARKS

Claims 1-7 and 27-42 are pending. The claims stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Lait (1993) 73, 381-388 ("Gupta 1993") or 5,750,177 ("Yee").

Applicants thank the Examiner for the courtesy extended during the phone interview on May 5, 2009. During the phone call, the Declaration of Dr. Fui Mei ("the Dr. Mei Declaration") was discussed. Applicants explained the distinction in the Dr. Mei Declaration between the data in Tables 6 and 8 reported therein. This response summarizes the distinction in more detail. In light of the discussion during the interview, Applicants understand that, in view of the Dr. Mei Declaration, the claims likely overcome the art of record, but that the Examiner will need to reconsider the art and the Declaration again.

Regarding the rejections in the Office Action dated February 2, 2009, Applicants incorporate the previous response filed December 2, 2008 in its entirety along with the Supplemental Declaration of Dr. Isabelle Laye and the Declaration of Dr. Fui Mei. The previous response and Declarations address the rejections to the claims under 35 U.S.C. § 103(a). Applicants respectfully request reconsideration of the previous response and Declarations in light of the substance of the interview held on May 5, 2009.

Additionally, regarding the previously submitted Declaration of Dr. Isabelle Laye, the present Office Action stated that the Declaration was not commensurate in scope with the broadest claim because claim 1 does not require the presence of an emulsifier. (Office Action, February 27, 2009, p. 4.) Applicants have amended claim 1 to define the presence of an emulsifier and have amended independent claim 27 to define about 2 to about 5 percent of the emulsifier. Support for this amendment can be found in the specification at page 8, line 19 to page 9, line 4.

The present Office Action also indicated that the Dr. Mei Declaration did not explain the differences in the height decrease provided in Table 6 relative to the melting point data of Table 8. As discussed in the phone interview of May 5th, the height decrease in Table 6 was merely provided as evidence to show that the cheese made according to the description of

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Gupta was duplicated as best as possible because similar height decreases were observed in the duplicate cheese as compared to that reported by Gupta using his non-standard softening or melting quality test. The decrease in height as reported by Gupta is an indication of cheese softening, but is a measurement of a completely different characteristic of cheese from the melting point/dropping point as measured by a Mettler Dropping Point Furnace, which is provided in Table 8 of the Dr. Mei Declaration.

The data in Table 8 of the Dr. Mei Declaration is a measurement of "dropping point," which is the same characteristic of cheese as defined in the present specification and, thus, the claims. As stated in the present specification, the dropping point temperatures were determined using a Mettler FP-83 Dropping Point Furnace. (Specification, page 13, line 29 to page 14, line 4.)

The dropping point test measures the characteristic of a cheese when it turns to a flowable liquid sufficient to drop through a capillary cell and then fall to trigger a sensor located below the capillary cell. As evidenced by the data provided in Dr. Mei's Declaration in Table 8, the cheese of Gupta did not flow at all or melt at 212°F when using the same dropping point test as defined in the present specification. The claims define melting point (which the specification defines as measured by a Mettler Dropping Point Furnace) between 105°F and 150°F. Gupta's cheese is far outside this range. (Dr. Mei Declaration, ¶¶ 28 and 29.)

Specifically, as provided in Table 8 of the Dr. Mei Declaration, *the 20% Gupta sample had a casein to whey ratio within those required by the claims (i.e., 1.7:1), but did not have a dropping point melt required by the claims as measured by the same test used in the present application (no melt at 212°F)*. (Dr. Mei Declaration, Table 8 and ¶¶ 28 and 29.) This is direct factual evidence of non-obviousness. Thus, the cheese of Gupta does not anticipate or suggest the claims are obvious. There is no disclosure or other evidence in Gupta or Yee that describe how to achieve a cheese with a casein-to-whey ratio between 3:1 and 1:1 that has the dropping point melt between about 105 and 150°F as required by the claims.

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This factual and scientifically established evidence can not be ignored. *Ex Parte Whalen*, 89 USPQ2d 1078, 1083-84 (BOPAI, July 23, 2008) states that a conclusion of obviousness in an Office Action must be supported with "evidence or scientific reasoning" and that a conclusion of obviousness is improper if it can not be supported with "any explanation based on scientific reasoning." In light of the factual evidence provided in the two declarations previously submitted, if the Office Action continues the rejections based on Yee and Gupta, it is respectfully requested that evidence or a scientific reasoning be provided in response why the factual data provided in the Declarations, which provide a direct comparison using the same test method, are inadequate.

Reconsideration and allowance of claims 1-7 and 27-42 are respectfully requested as none of the cited references either alone or in combination disclose or suggest the claimed melting points in a processed cheese having the defined casein-to-whey ratios. All that the cited prior art references demonstrate is that increasing the amount of whey in processed cheese to the levels of the claims results in an increased melting point as determined by a Dropping Point Furnace. The claimed processed cheese, on the other hand, does indeed show unexpected results because the claimed melting points as determined by a Dropping Point Furnace are much lower than expected from either Gupta 1993 or Yee as demonstrated in the three declarations provided in the previous responses.

The Commissioner is hereby authorized to charge any additional fees which may be required with respect to this communication, or credit any overpayment, to Deposit Account No. 06-1135.

Respectfully submitted,
FITCH, EVEN, TABIN & FLANNERY

Dated: May 11, 2009

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